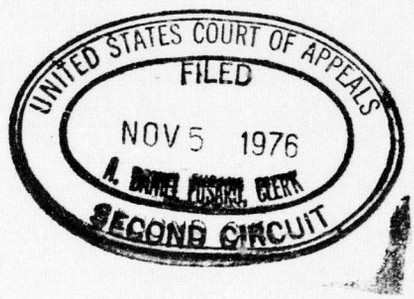
United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-7482

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



THE CORPORATE PRINTING COMPANY, INC.

Petitioner-Respondent,

vs.

NEW YORK TYPOGRAPHICAL UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION,

Respondent-Appellant.

APPELLANTS BRIEF AND APPENDIX TO BRIEF

John J. Sheehan
Attorney for Respondent-Appellant
Office and Post Office Address
51 Chambers Street
New York, New York 10007

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

76 Civ. 2640 CORPORATE PRINTING CO. VS NY TYPOGRAPHICAL UNION WERKER,J.

DATE	NR.	PROCEEDINGS
6-16-76	1	Filed complaint and issued summons.
06-18-76	2	Filed petitioner's affdvt. and ORDER TO SHOW CAUSE for prel. inj. ret. 6-24-76. Answering papers to be submitted by 6-23-76 at 12 noon. - Kanpp, J. (Part I)
06-18-76	3	Filed pltfs memorandum of law in support of No. 2.
06-24-76	==	HEARING HELD on prel. inj. -- Decision reserved. == Werker, J.
07-09-76	4	Filed OPINION #44729..The Court grants judgment to the petitioner. The Union is restrained. Submit order on notice. -- Werker, J. m/n
08-17-76	5	Filed Judgment and order that the issues raised in the order to show cause effectively disposes of the petition itself, and it is further ordered that the Court grants judgment to the petitioner and that the Union is permanently restrained as indicated. -- Werker, J. Judgment entered - Clerk., m/n
09-14-76	6	Filed notice of entry of above order amd judgment. (no.5)
09-17-76	7	Filed respondents notice of appeal to the USCA for the 2nd Circuit from order of 8-16-76 and judgment entered on 8-18-76 -- m/copy.
10/22/76		Filed affdvt of John J Sheehan requesting the dismissal of the petition.
10/22/76		Respondent's memorandum in opposition to petitioner's application for a preliminary injunction.
10/22/76		Filed letter to Judge Werker from John J. Sheehan.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE CORPORATE PRINTING COMPANY, INC., Petitioner-Appellee, v. NEW YORK TYPOGRAPHICAL UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION, Respondent-Appellant.	Docket No. 76-7482

RESPONDENT - APPELLANT'S BRIEF

STATEMENT

This brief is submitted in support of the Appellant Union (Union) in it's appeal from and order and judgment of the United States District Court, Southern District of New York entered on August 18, 1976. The order and judgment, permanently restrained the Union from organizing petitioner's (Company) managerial employees for the purpose of representing them as part of the Union's bargaining unit, and from any activity which would compel the company to recognize those employees as members of the Union.

THE FACTS

At the outset it should be noted that there is no factural dispute involved in this case. The facts are: the parties

herein are parties to a collective bargaining agreement which provides in part, as follows:

> "In the event the Union should claim representation rights for units of employees not covered by this Contract, and not represented by any other Union, the parties agree that the Union may submit authorization cards signed by such employees to a third party, mutually agreed upon by the parties, for comparison with the Employer's payroll. If it is determined that a majority of such employees have authorized the Union to represent them, the Employer shall recognize the Union as the bargaining agent for all employees in such classification. If the parties are unable to agree upon a third party to make signature comparisons, the New York State Board of Mediation is authorized to make such comparisons and certification."

On May 3, 1976, in accordance with the contract provisions quoted above, the Union requested the New York State Board of Mediation to make the signature comparisons. The Company, thereupon moved in New York State Supreme Court to enjoin the Union from taking any such action. The Company was unsuccessful in the State Court action, and then commenced the within action.

The basis for the Company's action is that the National Labor Relations Board, Second Region, has held that the employees which the Union seeks to represent are managerial employees. That determination was made in a Board proceeding initiated by Company. In that proceeding, the Union requested that the Board defer to arbitration, as provided for in the contract between the parties. The Regional Director of the Board declined to rule upon the Union's request but, instead, dismissed

the employer's petition.

CONTENTIONS OF THE PARTIES

The Company, in paragraph 12 of its petition sets forth its position as follows:

> "That there is no authority or jurisdiction to include the customer service employees as part of the Respondent's collective bargaining unit, and that in point of fact, these employees, as a matter of law, cannot become members of the Respondent."

The Union asserts that customer service employees have a statutory right to become and remain members of a labor organization, Section 14(a) of the Labor Management Relations Act of 1947, as amended 29 U.S.C. 164(a); that the dispute between the parties is referrable to arbitration; under the terms of the contract and, thirdly, the Union - asserts that under the provisions of the Contract between the parties, the Company has consented to the organization of its managerial employees.

THE STATUTE INVOLVED

Section 14(a) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. 164(a), reads as follows:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

HOLDING OF THE COURT BELOW

In its opinion, the Court below held that the Union "is precluded by law which prohibits [customer service employees] inclusion (in the bargaining unit) except upon the consent of the employer;" and that, since the union states that, it did not seek certification by the NLRB, the Court held "That the Contract by its own terms does not obligate the employer to do what the Union requests."

SUMMARY OF UNION'S ARGUMENT

The Contract calls upon the New York State Mediation Board to perform a Ministerial Act, to wit, compare employee signatures on Union authorizations with signatures on the company's payroll and certify the results.

The Company, by contractually granting the Union the right to represent employees outside the designated bargaining unit and who are not otherwise represented, "consented" to the Union's right to represent managerial or supervisory employees. This right was conditioned solely upon the Union's obligation to secure authorization cards from the affected employees and to have them certified as to a majority by a third party; both of which steps the Union had, or was prepared to carry out. That consent may not be revoked during the term of the contract. The Court below was in error when it held that the company's consent was not given.

Contrary to the Company's position, there is no law

which prohibits its customer service employees from becoming members of Respondent Union. Indeed, the law expressly gives to such employees the right to become members of Respondent Union.

POINT I

THE COURT BELOW ERRONEOUSLY APPLIED BOTH STATUTORY AND CASE LAW APPLICABLE TO THE FACTS IN THE CASE.

The Court below in its opinion said:

> "These managerial employees of the petitioner cannot be a part of a bargaining unit represented by respondent because under the Act they are excluded from the protection of the Act with respect to representation or bargaining. Managerial employees were placed in this position by the Supreme Court in its interpretation of the Act in NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974)."

In NLRB v. Bell Aerospace Co., the Supreme Court was not dealing with a situation similar to the one involved ir this case. In that case, the Court passed upon the effort by a Union to become the agent, certified as such by the NLRB, of managerial employees. The NLRB rejected the Union's effort and the Supreme Court upheld that decision of the Board.

That is not what the Union is seeking in this case. The Union does not seek, nor has it sought, to be certified by the NLRB as agent of customer service employees. What the Union seeks is compliance by the Company with the terms of its contract

with the Union.

In its opinion, the Court below, after correctly stating the position of the Union that it does not seek certification by the NLRB, concluded: "Thus the Contract by its own terms does not obligate the employer to do what the Union requests." That holding below is a complete non sequitur for the Contract does not require the Union to seek NLRB certification before the employer becomes obligated to recognize the Union for an unrepresented classification of employees. Thus, the foundation for the Court's ruling is without support in the facts of this case.

In effect, the Court below inserted into the Contract a further provision that the Union must secure N.L.R.B. certification, before the above quoted Contract clause could become operative. There is no legal basis for that position. If, in fact, there is a dispute between the parties over the meaning of Contract language, that dispute should be referred to arbitration, as provided for in the Contract.

The Court below in its opinion correctly states the holding of the Supreme Court in Florida Power and Light Co. v. Local 641, 417 U.S. 790 that both supervisory and non-supervisory may be covered by the same union Contract, if the employer consents. The Court in so holding, in that case, rejected the whole basis of petitioner's application for an injunction as set forth in paragraph 12 of its petition, quoted above. No where in its petition does petitioner allege that it has not consented

to a unit of customer service employees.

There is no basis in the record for the finding of the Court below that the petitioner has not consented to its supervisory employees becoming Union members nor did the Court advert to the terms of the Contract to support its unwarranted finding. Indeed, the Court below usurped the function of an arbitration in so holding.

Upon the argument of the application for an injunction in the Court below representations were made by the Union in a memorandum to the Court, that the agreement between the parties is an industry-wide one covering commercial printing establishments in the City of New York; that the Company's obligations under the Contract arise from its membership in Printers League Section, Printing Industries of Metropolitan New York, Inc.; that Section 111 of that Agreement has been a part of the Contract for a number of years and that pursuant to its provisions, the employees of many signatory employers in the classification of customer service production have authorized the Union to represent them and their employers have accorded the Union such recognition. Those representation were not challenged by the Company at any time and they are factually correct.

POINT II

THE CONTRACT BETWEEN THE PARTIES PROVIDES FOR THE ARBITRATION OF DISPUTES, THEREFORE, THE DISPUTE, IF ANY SHOULD BE REFERRED TO

ARBITRATION.

In the Contract between the parties there is a provision which requires the arbitration of "all differences of opinion on any question . . ." arising under this Contract . . ."; and, if the parties are unable to agree upon the arbitration, the American Arbitration Association is empowered to designate one.

Under such circumstances, the law is clear that the dispute must be referred to arbitration rather than be decided by the Court.

United Steelworkers v. American Mfg. 363 U.S. 564.

United Steel workers v. Enterprise Wheel and Car, 363 U.S. 593.

CONSLUSION

THE JUDGMENT AND ORDER OF THE COURT BELOW SHOULD BE REVERSED AND THE PETITION SHOULD BE DISMISSED.

Respectfully submitted,

John J. Sheehan,
Attorney for
Respondent-Appellant
51 Chambers Street
New York, New York 10007
CO 7 - 2022

APPENDIX TO

APPELLANTS BRIEF

SAME TITLE

76 CIV. 2640

PETITION

Petitioner by its attorney, WILLIAM G. O'DONNELL

JURISDICTION

Jurisdiction of this Court is based upon the National Labor Relations Act as amended (the "Act), 29 USCA Sections 152 (3), (11); 158 (a) (1,5); 159; 159 (c); 164 (a); and principles of pendant jurisdiction.

THE PARTIES

1. The Petitioner is a corporation duly organized and existing under the laws of the State of New York with its principal place of business located at 225 Varick Street, New York, New York.

2. That the Petitioner is an employer and engaged in commerce within the meaning of 29 USCA §152 (2) (6) and it will effect the purposes of the Act to assert Jurisdiction herein.

3. That the Respondent is a labor organization within the meaning of 29 USCA §152 (5) of the Act claiming to represent certain employees of Petitoner, with its principal place of business located at 817 Broadway, New York, New York.

4. That at all times hereinafter mentioned Petitioner

and Respondent entered into a collective bargaining agreement between the Printers League Section of the Printing Industry of Metropolitan New York and Local Union No. 6, hereinafter referred to as the "Agreement."

5. That on or about May 3, 1976 the Respondnet requested the New York State Mediation Board to determine the validity of certain signature cards involving certain employees not covered by the Agreement.

6. That the signature cards mentioned hereinbefore concern the "customer service employees" of Petitioner.

7. That said employees are supervisory or management employees under §152 (11) and §159 of the Act and are thus not covered by the Act.

8. That prior hereto and before the request to the New York State Mediation Board, in or about June 1975, Petitioner commenced a proceeding before the National Labor Relations Board, Region 2 (the "NLRB") to declare the customer service department employees as being supervisory or management employees.

9. That the NLRB ruled that Petitioner was engaged in commerce within the meaning of the Act and the NLRB could assert jurisdiction over the matter.

10. That the NLRB ruled that the customer service department employees were supervisory managerial employees and were thus not subject to organization under the Act. A copy

of the Decision and Order of the NLRB is annexed as Exhibit "A".

11. That the proper procedure for the Respondent was to appeal the Decision and Order of the NLRB, not to proceed to organize the customer service employees.

12. That there is no authority or jurisdiction to include the customer service employees as part of the Respondent's collective bargaining unit, and that in point of fact, these employees, as a matter of law, cannot become members of the Respondent.

13. No previous application has been made for the relief sought herein.

WHEREFORE, Petitioner demands judgment:

(1) Staying and permanently enjoining the Respondent from making any and all attempts to organize or represent the customer service employees of Petitioner.

(2) Requiring the Respondent to abide by the determination of the NLRB declaring the customer service employees as being managerial.

(3) Granting to Petitioner such other and further relief as the Court may deem just and proper.

Dated: June 15, 1976

S/ William G. O'Donnell
Attorney for Petitioner

EXHIBIT A ANNEXED TO PETITION

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

THE CORPORATE PRINTING COMPANY, INC.

Employer-Petitioner

and

Case No.
2-RM-1735

NEW YORK TYPOGRAPHICAL UNION NO. 6,
INTERNATIONAL TYPOGRAPHICAL UNION

Union[1]

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Frank McCulloch, a Hearing Officer of the National Labor Relations Board. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the Regional Director for Region 2.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

---

[1]The names of the parties appear as amended at the hearing.

2. The labor organization involved claims to represent certain employees of the Employer.

3. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

The Employer-Petitioner, hereafter called the Employer, in its petition maintains that New York Typographical Union No. 6, International Typographical Union, hereafter called the Union, claims to represent a unit of its employees engaged in customer service production work. The Employer however contends that these employees are supervisors and infers that dismissal of its petition on this ground would be appropriate. The Union, though not disclaiming interest in representing such a unit, seeks dismissal of the petition on the ground that its contract with the Employer provides for arbitration if the Union should claim representation rights for employees not covered by such contract. In addition the Union maintains in its brief that the petition should be dismissed if the employees involved are supervisors as claimed by the Employer. However, at the hearing the Union took the position that these employees are not supervisors.

The Employer is engaged in financial printing. It has a composing room with employees represented by the Union, a press room and a bindery, each represented by different unions, where

the production of the financial printing is performed. The total work force varies between 60-100 employees in the various departments including messengers and drivers. In addition there are three commission salesmen who work outside the plant most of the time.

The employees in issue perform customer service production work. There are three such employees, two work the day shift and one the night shift. These employees deal with clients either in person or by phone. They talk to customers on new jobs or jobs in process. They receive copy from the customer, prepare the job for the plant, marking up copy. They designate and inform the foremen or the plant supervisor of the timing requirement of the job. They are responsbile for telling the client the layout, how it should be set up, how the job will be performed, and are responsible for overall quality. These employees have the authority to direct the foremen on priorities in performance and schedules of jobs, to determine whether overtime is required, to authorize foremen to assign overtime, and to rearrange production schedules. In addition, the customer service production employees order outside purchases and have the authority to contract out work such as press, typesetting and bindery work, as may be necessary to fulfill customer requirements. The uncontroverted testimony established that these employees can bind the company to sums of money in excess of $50,000 per month for payment for such contracting of work.

Further, they have the discretion to select the firms to which such work is sent without securing approval from any higher authority.

The Employer's top managerial staff consists of a president and two vice-presidents, one of whom works the day shift and the other at night. The testimony revealed that the vice-presidents had been customer service production employees prior to becoming officers. Managerial conferences often include the customer service production employees, and many policy decisions are made by the vice-president and the customer service production employees on duty at the time. In addition, the customer service production employee is the highest ranking official in the plant on those occasions when the vice-president is away.

These employees are paid an annual salary in excess of $23,000, are not paid for overtime, have no set sick leave and do not punch a clock. All production employees are hourly paid, receive overtime and sick leave, and punch a clock.

The Employer maintains that the three customer service production employees are supervisors. It bases this claim on the fact that they can direct the foremen of the different departments to change the schedule of work, can participate in decisions to authorize overtime, layoffs and recalls of employees generally, though not individually. Without passing on the supervisory issue, I find that the duties and authority of the

three customer service production men in issue establish them as managerial. Thus, their advice and expertise are relied upon by the Employer in making major decisions with respect to expanding or decreasing the work force. They have the discretion on their own to contract out work and purchase supplies involving large sums of money, without authorization from superiors. They sometimes are in overall charge of the plant, dealing with the foremen in place of the vice-president, and in general assist in running the company.

The Board has recently reiterated the proper legal standard to determine the managerial status of employees.[2] It reaffirmed its earlier rulings stating:[3]

> The Board long has defined managerial employees as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer,and those who have discretion in the performance of their jobs independent of their established policy [citation omitted]. . . . managerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather it is reserved for those in executive-type positions, those who are clearly aligned with management as true representatives of management.

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[2]Bell Aerospace, A Division of Textron, Inc., 219 NLRB No. 42.

[3]Id at p. 6; citing Eastern Camera, 140 NLRB 569, 571, and General Dynamics Corporation, Convair Aerospace Division, San Diego Operations, 213 NLRB No. 124.

It is clear from this definition of managerial employee that the customer service production men here at issue exercise sufficient discretion in their jobs to align them with management and they do formulate and effectuate management policies by expressing and making operative the decisions of their employer.[4] The Supreme Court having held that managerial employees are not covered by the Act,[5] I shall dismiss this petition.[6]

ORDER

IT HEREBY IS ORDERED that the petition filed herein be, and it hereby is, dismissed.[7]

Dated: August 20, 1975

S/ Sidney Danielson
Regional Director

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[4]Bell Aerospace, A Division of Textron, Inc., supra.

[5]N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267.

[6]In view of the decision herein, I find it unnecessary to consider the Union's contention that the case should be deferred to the arbitration provisions of the contract.

[7]Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by September 2, 1975.

EXHIBIT C ANNEXED TO PETITION

REPRESENTATION DETERMINATION

111. In the event the Union should claim representation rights for units of employees not covered by this Contract, and not represented by any other union, the parties agree that the Union may submit authorization cards signed by such employees to a third party, mutually agreed upon by the parties, for comparison with the Employer's payroll. If it is determined that a majority of such employees have authorized the Union to represent them, the Employer shall recognize the Union as the bargaining agent for all employees in such classification. If the parties are unable to agree upon on a third party to make signature comparisons, the New York State Board of Mediation is authorized to make such comparisons and certification.

SAME TITLE

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

WILLIAM G. O'DONNELL, being duly sworn, desposes and says:

I am the attorney for the Corporate Printing Company, Inc. ("Petitioner") and I am fully familiar with the facts and circumstances surrounding the within application. I submit this affidavit in support of Petitioner's Order to Show Cause to stay and enjoin the New York Typographical Union No. 6, International Typographical Union ("Respondent") from exercising or asserting any organization and or representation rights as to Petitioner's customer service employees.

As will be demonstrated hereinafter, the Respondent seeks to organize certain customer service employees of the Petitioner. Without doubt, the aforementioned employees are not subject to organization by the Respondent, under Section 9 of the National Labor Relations Act (the "Act") as previously determined. The employees at issue cannot become part of the present bargaining unit represented by the Respondent. By way of background, the Petitioner is a domestic corporation with its principal offices located at 225 Varick Street, New York, New

York. It is engaged in what is colloquially called "financial printing." Financial printers specialize in the processing of applications for corporate stock, bonds and other financial underwritings controlled by the Securities and Exchange Commission and other governmental regulatory agencies. Petitioner's clients are principally lawyers who write the specific text that is to be printed. The Petitioner's total work force varies between 60 and 100 employees depending upon demand.

In June of 1975, the Petitioner instituted a proceeding before the National Labor Relations Board (NLRB) to declare that the customer service employees at issue herein were supervisory or managerial employees and thus not subject to organization within the meaning of the Act. That petition was filed with the NLRB after Respondent expressed its intention to organize Petitioner's customer service employees.

For the Court's information, the customer service employees earn in excess of $24,000.00 per annum and in general exercise great discretion and authority in dealing with plant personnel and Petitioner's customers. The NLRB held that the Petitioner was engaged in commerce within the meaning of the Act and asserted jurisdiction over Petitioner's application. As indicated by the annexed Exhibit "A", the NLRB ruled that the employees were managerial employees not subject to organization within the present bargaining unit.

It should be noted that the Respondent did not appeal

the NLRB ruling either before the NLRB or in Federal District Court. As the foregoing will indicate, the Respondent is attempting to do indirectly what it could not do directly, to wit, organize the customer service employees of the Petitioner.

On or about May 3, 1976, the Petitioner requested the New York State Mediation Board (the "Board") to determine the validity of certain signature cards. (See annexed Exhibit "B"). These individuals are in point of fact the customer service employees previously discussed. The Respondent, allegedly pursuant to a collective bargaining agreement between the Printers League Section of the Printing Industry of Metropolitan New York (the "League") and Respondent, may present a demand to organize non-union people in the plant covered by the agreement. (See Section 111 of the League Respondent Agreement annexed hereto as Exhibit "C"). However, and this is of critical importance, the Respondent may only demand to organize those employees covered by the Act and not the managerial employees herein, who cannot become part of the same bargaining unit. The NLRB has already determined that the customer service employees are not subject to organization. There can be no agreement as a matter of law for the employees herein to be part of the present unit. As stated, this has already been determined and decided by the NLRB.

In summary, the employees at issue are managerial employees exercising great discretion and receiving substantial salaries. There is no authority or jurisdiction conferred on

the Board to determine the issues herein. The attempted organization of these employees is already the subject of a decision and order of the NLRB. As stated in greater detail in the accompanying memorandum of law, 29 USCA §164 and the relevant case law clearly demonstrate that managerial employees cannot be included within the present bargaining unit.

This motion has been brought on by order to show cause because the Respondent has already requested the New York State Mediation Board to compare the signature cards of the employees and has already attempted organization.

At approximately 11:30 A.M. on Monday, June 14, 1976, my associate Stuart F. Gartner spoke to the attorney for the Respondent, Mr. Sheehan, and advised him that an application would be made for the relief sought herein.

No previous application for the relief sought herein has been made.

WHEREFORE, it is respectfully requested that an order be entered permanently enjoining and staying the request for arbitration of the Respondent together with such other further relief as to this Court may seem just and proper.

Dated: June 16, 1976

S/ William G. O'Donnell
Attorney for Petitioner

SAME TITLE

INDEX NO. 76 Civ. 2640

AFFIDAVIT

JOHN J. SHEEHAN, being duly sworn, deposes and says:

1. I am counsel to the Respondent herein.

2. I am fully familiar with all of the proceedings had in this matter.

3. By the terms of a contract between the parties to this proceeding, the New York Mediation Board is empowered to designate an arbitrator to resolve disputes between them.

4. At the present, there is a dispute between the parties arising out of their Contract that is before the New York State Board of Mediation for determination by an arbitrator designated by that Board. The dispute concerns the comparison of signatures of Petitioner's employees in the classification of "customer service production" who have designated the Respondent to represent them.

5. Heretofore, the Petitioner sought a stay of any proceedings by the New York State Mediation Board on such dispute by application to the Supreme Court of the State of New York, New York County. That application was denied by Mr. Justice Fraiman. In so doing, Judge Fraiman held that his ruling did not determine the issue of whether the union has the right to organize such employees, as the Petitioner did not raise that

issue in its petition.

6. In its Petition to this Court, the Petitioner seeks an injunction enjoining the Respondent

> "from making any and all attempts to organize or represent the customer service employees of Petitioner."

7. The law is clearly opposed to Petitioner's application. In the Labor Management Relations Act of 1947, the Congress expressly permitted supervisors to become members of a labor organization. In Section 14(a) of that statute, 29 U.S.C. 164(a) it is provided:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

WHEREFORE, it is respectfully prayed that the application for a preliminary injunction be in all respects denied and that the Petition be dismissed.

Dated: June 23, 1976

S/ John J. Sheehan
Attorney for Respondent

SAME TITLE

OPINION
76 Civ. 2640 (HFW)
#44729

HENRY F. WERKER, D. J.

The petitioner filed a petition for the purpose of obtaining a judgment:

1. Staying and permanently enjoining the respondent from making any and all attempts to organize or represent the customer service employees of petitioner.

2. Requiring the respondent to abide by the determination of the NLRB declaring the customer service employees as being managerial.

3. Granting to petitioner such other and further relief as the court may deem just and proper.

Jurisdiction is found under the National Labor Relations Act ("the Act"), 29 U.S.C. §§152(3), (11); 158(a)(1),(5); 159(c) and 164(a).

By decision and order dated August 20, 1975, the Regional Director of the National Labor Relations Board, Region 2 found "that the duties and authority of the three customer service production men in issue establish them as managerial." This decision and order has not been appealed by the Corporate Printing Company, Inc. ("the Company') or the New York

Typographical Union No. 6, International Typographical Union ("the Union") although the proceeding had been brought by the Company to establish these employees as supervisors.

The petitioner filed an order to show cause for an order enjoining the Union from exercising any organizational activity concerning its customer service employees and granting petitioner such further relief as the court deems proper. Both the Company and the Union agreed upon the hearing of the order to show cause that the facts recited in the aforementioned Decision and Order were correct and that no changes had occurred since the Order. They further indicated that in view of this fact no evidentiary hearing was required. I adopt the findings of fact recited in the Decision and Order. There is also no dispute that the employees involved are managerial.

Respondent here has entered into a Contract with petitioner which provided inter alia at paragraph 111.

REPRESENTATION DETERMINATION

> 111. In the event the Union should claim representation rights for units of employees not covered by this Contract and not represented by any other union, the parties agree that the Union may submit authorization cards signed by such employees to a third party, mutually agreed upon by the parties, for comparison with the Employer's payroll. If it is determined that a majority of such employees have authorized the Union to represent them, the Employer shall recognize the Union as the bargaining agent for all employees in such classification. If the

> parties are unable to agree upon a third party to make signature comparisons, the New York State Board of Mediation is authorized to make such comparisons and certification."

On or about May 3, 1976, the respondent requested the New York State Mediation Board to determine the validity of signature cards of the customer service employees of petitioner.

These managerial employees of the petitioner cannot be a part of a bargaining unit represented by Repondent because under the Act they are excluded from the protection of the Act with respect to representation or bargaining. Managerial employees were placed in this position by the Supreme Court in its interpretation of the Act in NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974).

The case of Florida Power & Light Co. v. Local 641, IBEW, 417 U.S. 790 (1974) cited by respondent is inapposite for the reason that in that case the Florida Power & Light Company had consented to its supervisory employees retaining union membership. Here the employer has not done so. This is the option Congress has granted to the employer. Florida Power & Light, supra at 812.

In the case of Swift & Co., 115 NLRB 752, 753-754 (1956) the Board refused to approve a unit of procurement drivers who were found to be representative of management, the Board declared:

> "It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act. Accordingly, we reaffirm the Board's position that representatives of management may not be accorded bargaining rights under the Act." (footnotes omitted).

Accordingly in this case respondent's actions under paragraph 111 of the contract with petitioner are but one step toward including the managerial employees in its bargaining unit. That step is precluded by law which prohibits their inclusion except upon the consent of the employer. In the language of the NLRB in Swift, supra they "cannot be deemed to be employees" for purposes of implementing paragraph 111 of the contract. Furthermore, pursuant to the explicit language of the contract the provisions of paragraph 111 do not become operative until the Union claims representation rights in a unit of employees not yet covered. By letter to the court dated June 26, 1976 the Union expressly stated that its "has not sought and does not seek certification by the NLRB." Thus the contract by its own terms does not obligate the employer to do what the Union requests.

This also the language incorporated in 29 U.S.C. § 164(a) which reads as follows:

> "(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to

deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

The court finds that resolution of the issues raised in the order to show cause effectively disposes of the petition itself. The court grants judgment to the petitioner. The court orders that

(1) the Union be and hereby is restrained from organizing petitioner's managerial employees for the purpose of representing them as a part of the Union's bargaining unit and it is further ordered that

(2) the Union is restrained from any activity with respect to those employees which compels the petitioner to recognize those employees as members or prospective members of the Union and it is further ordered that

(3) the Union abide by the determination of the NLRB declaring the customer service employees to be managerial employees.

Dated: July 7, 1976

S/ Henry F. Werker
U.S.D.J.

SAME TITLE

76 Civil 2640

(H.F.W.)

ORDER &
JUDGMENT

Petitioner having moved by order to show cause for an order pursuant to Rule 65 of the Federal Rules of Civil Procedure, to enjoin respondent NEW YORK TYPOGRAPHICAL UNION NO. 6, its agents, employees and all persons acting on their behalf or in active concert or particpation with them, from exercising any organizational activity concerning the customer employees of THE CORPORATE PRINTING COMPANY, INC., and said order to show cause having duly come on to be heard on the 24th day of June, 1976, and the petitioner having appeared by William G. O'Donnell, Esq., in support of said order to show cause and respondent having appeared by John J. Sheehan in opposition thereto and after due deliberation having been had thereon:

NOW, upon reading and filing the order to show cause dated June 17, 1976, the affidavit of William G. O'Donnell, Esq., with exhibits annexed thereto, sworn to the 16th day of June, 1976, the petition dated June 15, 1976, the petitioner's memorandum of law dated June 15, 1976, the affidavit in opposition of John J. Sheehan sworn to the 23rd day of June 1976, the

opinion of the Court dated July 7, 1976, and upon the motion of William G. O'Donnell, attorney for petitioner, it is hereby

ORDERED, that the issues raised in the order to show cause effectively disposes of the petition itself, and it is further

ORDERED, /adjudged and decreed that the Court grants judgment to the petitioner, and it is further

ORDERED, that New York Typographical Union NO. 6 International Typographical Union ("The Union") be and hereby is permanently restrained from organizing petitioner's managerial employees for the purpose of representing them as part of the Unions bargaining unit, and it is further

ORDERED, that the Union is permanently restrained from any activity with respect to the those managerial employees which compels the petitioner to recognize those employees as members of the Union and it is further

ORDERED, that the Union abide by the determination of the National Labor Relations Board declaring the customer service employees to be managerial employees.

Aug. 16, 1976

S/ Henry F. Werker
U.S.D.J.

JUDGMENT ENTERED 8/18/76

Raymond F. Burghardt
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE CORPORATE PRINTING COMPANY, INC.
Petitioner-Respondent,

vs. Docket No. 76-7482

NEW YORK TYPOGRAPHICAL UNION NO. 6,
INTERNATIONAL TYPOGRAPHICAL UNION,
Respondent-Appellant.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

JOHN J. SHEEHAN, being dult sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age, and that on the 5th. day of November, 1976, deponent served the within Appellant's Brief and Appendix upon William G. O'Donnell, Esq., attorney for Respondent in this proceeding, at 509 Madison Avenue, New York, New York, 10022, the address designated by said attorney for that purpose by depositing two true copies of the same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

John J. Sheehan

Sworn to before me this
5th. day of November, 1976.

Conrad F. Sheehan

CONRAD F. SHEEHAN
Notary Public, State of New York
No. 60-3625010
Qualified in Westchester County
Commission Expires March 30, 1977